UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HEATHER ZHAO,	:	13-CV-2116 (PAC)
Plaintiff,	:	
v.	:	
DEUTSCHE BANK AG,	:	500 Pearl Street New York, New York
Defendants.	:	October 31, 2013

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE DEBRA C. FREEMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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THE COURT: Hi. It's Judge Freeman. Good morning.

MR. GOTTLIEB: Good morning, Your Honor.

THE COURT: Who do I have on for plaintiff?

MR. GOTTLIEB: This is David Gottlieb from Thompson Wigdor for the plaintiff and I'm also here with Matt Pisciotta, an associate whose admission in the Southern District is pending.

THE COURT: Okay. And who do I have for defendant?

MS. KAISER: Sure. It's Eliza Kaiser for Deutsche Bank and sitting here with me is Samantha Keegan whose admission in the Southern District is also pending.

THE COURT: Well you're balanced.

MS. KAISER: We are.

THE COURT: You should introduce each other.

So I have this discovery dispute in front of me. It's a new case. I have it for general pretrial supervision so I should talk to you in general about my supervision of the case and what that will entail and you get an overall sense of things and then I have this particular discovery dispute about electronic discovery and search terms.

Can somebody, first of all, bring me up to date on where things currently stand in discovery as a whole, whether you have some deadlines in place, whether you need deadlines in place, whether you're working otherwise well together or not? Just give me just the global story.

MR. GOTTLIEB: Sure, Your Honor. At this point I think I can safely say we've been working well together in discovery. At this point both sides have served document requests and interrogatories. Both sides have responded to those discovery requests and we, plaintiff has served a deficiency letter on defendants and I'm sure defendants will probably be doing one of their own and we will then work to resolve those issues before making any potential motions to compel.

THE COURT: So you have a deadline in place for close of fact discovery?

MR. GOTTLIEB: We do.

MS. KAISER: Was it February --

MR. GOTTLIEB: 14th.

MS. KAISER: Yes.

MR. GOTTLIEB: February 14th is the close, the current deadline for the close of discovery, Your Honor.

THE COURT: So that still gives you some time on the clock. You think that's going to work?

MR. GOTTLIEB: Well, we still have a -- we have a significant amount of discovery to do in terms of a number of different items and then of course there will be a number of depositions. So with the holidays coming up I'm not sure what we're going to be able to resolve and what we're going to need to make motions on if any. So I think it's too early to tell

whether we'll be able to really get everything done by February 14th but we're certainly making our best efforts to get everything done in an expeditious manner.

MS. KAISER: I concur with that, Your Honor.

THE COURT: Well, my advice on this is don't wait too long to sketch out when depositions are going to be on the calendar especially if you have a holiday season. Talk to each other about who the witnesses are, get the notices out so you can be negotiating about dates and talk to your -- talk to the witnesses about their availability, talk to each other about availability and sketch it out on the calendar and you say all right, we have until February 14, we assume that there are going to be a lot of depositions in January, what does everybody's calendar look like in January, can we reserve this week or that week to try to get some depositions done and have a plan because the longer you wait to try to have a plan with all different moving parts the harder it is to make it happen and then you'll be saying Judge, we tried but this one is away or I'm busy or something. But if you planned ahead of time you might have avoided that problem.

MR. GOTTLIEB: Your Honor, I agree with the sentiments wholeheartedly. We currently have a number of different document discovery issues that will likely need to be resolved before we can take certain depositions and I don't think we need to get into all of those document issues today

because again the parties are trying to work them out informally.

THE COURT: Okay.

MR. GOTTLIEB: But the -- it may be difficult for us to schedule depositions until certain document issues are resolved first.

THE COURT: Right. But you can schedule them a little bit farther out and you can keep an eye on those dates as you're working through document issues and you can say look, we need to get these document issues resolved no later than such and such a date so that if documents are going to be produced they can be produced no later than such and such other dates so we can review them in time for this deposition and it will really make you see what has to happen and then if you see a problem you'll know when you need to get in touch with me and say this is why this is going to upset the apple cart on the schedule you've worked out and this is why we need your attention soon and we've been negotiating a little bit faster because we see that all coming as opposed to just letting it drift and then saying well, we won't put depositions on the calendar until we work out the document issues, we're not going to work out the document issues until we first do our letters and talk. If you look from the back end forward you'll see that kind of pressure you need to put on yourself to try to get these things worked out or at least

for my attention.

If you send something to me for my attention and you've tried really diligently and I hold you up I will obviously give you more time. I'm not going to penalize you because of my delay.

Let me turn to the particular issue that you told me about which I assume is still an open issue about the email?

MR. GOTTLIEB: Yes, Your Honor.

MS. KAISER: Yes, Your Honor.

THE COURT: So as I understand it there are -- the plaintiff -- the first issue is that terms related to the reduction in force but not connected to plaintiff's name in particular and whether those should be included in searching emails of three particular custodians, why is defendant's view that the reduction in force terms should be searched only in conjunction with plaintiff's name? Might there not be relevant evidence come up about the reduction in force? Wouldn't you in fact say that there's evidence about the reduction in force that would be relevant not only in conjunction with plaintiff's own name?

MS. KAISER: Sure, Your Honor. So, first of all, as you know this is a single plaintiff discrimination case about Ms. Zhao and about her termination from Deutsche Bank and her selection for inclusion in the reduction in force that occurred at the end of 2012. There were 87 people terminated

in the reduction of force, that it was a worldwide reduction in force across different business units of Deutsche Bank. There were different decision makers who made the termination decisions for the different business units at issue. So we've identified Benjamin Pace as being the decision maker who elected to include Ms. Zhao in the reduction in force.

THE COURT: So why wouldn't -- why would documents in the custody of that individual who was the decision maker in her particular case be particularly relevant regards as to whether they mention her name if you can see this decision maker's sort of thought process as to who should be let go and who should not be let go in a reduction of force even if you don't do something company wide?

MS. KAISER: Well, so Mr. Pace made decisions -- I mean with reference to business [inaudible] other than Ms. Zhao's so he would have made decisions concerning many more business areas in other parts of the world and I'm not sure how many people who reported up to him were terminated. I don't know of the 87 the exact number but the fact is we would be forced to provide information about other employees who were selected for termination and obviously that implicates some pretty significant employee confidentiality concerns.

THE COURT: Don't you have already have a confidentiality stip in place in the case?

MS. KAISER: We do. We do. And the concern also

being that these people were at different levels and different business areas and are not people who were similar to Ms. Zhao in terms of their job functions, in terms of their titles and so it's just -- we think it's a stretch.

With respect to the other custodians, Ms. Kirschenbaum for instance, the HR person, she oversaw the entire -- as a business partner for HR she oversaw the entire private wealth management division. So that's an even larger business area than Mr. Pace was responsible for. So again there would be people in completely different business areas than Ms. Zhao who Ms. Kirschenbaum may have emailed with respect to.

Again, we have concerns about what their -- there would be different decision makers at issue for those termination decisions and again we do have concerns about employee confidentiality in protecting information about other employees.

THE COURT: Well, I'm not as worried about the confidentiality issues because we can deal with through confidentiality protection. Obviously there's already a rule in place that says you don't file anything on the public docket that has personal identifying information and to the extent that there's material in personnel files or just the documents that come up through email searches, if there's information that has to do with other employees' job

performance or things that are confidentiality it's appropriate to keep that confidential at this stage and to have a confidentiality order cover that. But usually in discrimination cases if you can identify the decision maker then other decisions made by that same decision maker especially in the context of the same business event, the reduction of force would be relevant and usually appropriate to produce. I guess the question -- maybe I should direct this to plaintiff is how do you keep this from being over broad and potentially over burdensome while still getting at the conduct of the decision maker or decision makers here.

MR. GOTTLIEB: Well, Your Honor, I think we've already done that and the way we've done that is by limiting the RIF related search terms to really a limited number of people, three people who defendants have represented were the three people directly involved in the RIF. We've limited --

THE COURT: Directly involved in the reduction in force or directly involved in the decision to terminate her in that reduction in force?

MR. GOTTLIEB: The latter, Your Honor. It would directly involve in the decision to terminate Ms. Zhao, the plaintiff.

And in addition, Your Honor, we've also limited the RIF related search terms to a temporal period during which the RIF took place. So, for instance, other terms related to Ms.

Zhao's performance and other related issues we searched -- we agreed to a search times of a number of years but the RIF it's only a limited period of time.

To the extent there are some documents that the search terms yield that are not directly related to Ms. Zhao's termination or her group I mean that's what happens in -- when we do [inaudible] search protocols and what we're attempting to accomplish with the protocols to make sure that we are capturing as many relevant documents as possible and the fact of the matter is in these types of situations the defendants often need to review the documents and determine which ones are relevant and responsive and which ones are not. So part of the nature of --

THE COURT: Well, hold on a second. In terms of what's relevant in response what you're saying is search -- use these search terms to search through these people's emails but then don't produce that universe. You're saying go through them and only produce documents that are responsive to particular document demands; is that right?

MR. GOTTLIEB: Well, yes. I imagine that defendants are going to conduct a review of all the documents that the search terms yield and give privilege review of course and give review for documents that are completely irrelevant. So I imagine that would be part of the process.

THE COURT: Well, I think the defendants are going to

say a lot of documents are irrelevant that you're not going to say are irrelevant but the question is not really that. The question is what is the -- maybe you have it in these papers. It's been a while since I looked at them but what are the particular document requests to which you believe these would be responsive. The document request is not in and of itself all documents, all emails sent to or from this person, right, regarding --

MR. GOTTLIEB: That's correct.

THE COURT: -- production in force. It's a document request that is documents related to the decision to terminate her or documents related to something else. And what is the request that's at issue?

MR. GOTTLIEB: Well, Your Honor, there are really a number of different requests that would be at issue but we certainly asked for documents related to the criteria used in the RIF, documents related to the way Ms. Zhao was evaluated and considered in connection with the RIF and the way other people within her group were evaluated for termination or lack thereof in connection with the RIF. So really what we're interested in is we want to know what the criteria was for the RIF so we can then evaluate whether Ms. Zhao was properly selected or whether she did not fit the criteria and therefore the RIF was really used as a pretext but also to show how others were evaluated.

THE COURT: Let's say for example there's an email where one of these people says to another one of these people or somebody else for that matter under the RIF let's consider terminating Mr. John Doe whose performance has not been that strong over the last few years. Now, that would be a document responsive to some request and if so, what request would that be responsive to? You've got to kind of pin this down to what it is you're looking for and think about what kinds of documents you're likely to capture and why you're looking for them.

MS. KAISER: Your Honor, if I may just respond to the point that counsel made?

THE COURT: Sure.

MS. KAISER: So, first of all, with respect to the criteria used for the RIF process and Mr. Gottlieb has not received our response yet to claims deficiency letter so I'm not sure that this issue is crystal clear for plaintiff but we are -- we have sort of reassessed plaintiff's request and we are going to be circling back to our HR department and seeing if they have any documentation concerning the criteria used to select people for inclusion in the RIF. We are going to be conducting a targeted search for that type of documentation. So I think rather than conducting wide ranging email searches for that documentation we can do it in a more targeted way and obviate the need for ESI searches on that basis.

With respect -- then the other purported reason that plaintiff's counsel stated that they need the searches conducted is an order to determine why Ms. Zhao was selected for the RIF. We have agreed to use these RIF terms in connection with her name and therefore would uncover those documents by running such searches.

I also want to make the point that Mr. Gannem is one of the people that they've included in this request as a custodian and we have not identified Mr. Gannem as being a decision maker. It was Mr. Pace as I said before who we've identified as the decision maker. So I just don't see the relevance frankly of Mr. Gannem as a custodian to the extent Your Honor orders such searches.

MR. GOTTLIEB: Well, that last point never came up before until just now and Mr. Gannem was the supervisor of her group and the global head of private markets. So I really -- I think he's certainly appropriate for -- to be one of the custodians.

But in terms of -- I mean if the defendant is circling back to look for documents related to the criteria I mean that's -- that's great but I don't know what that entails but what I do know is that we need to have emails that reflect the criteria used, not just maybe some document that says these are what you should consider. We need to look at the emails surrounding the RIF and look at what the decision

makers were considering and that will be -- we'll see that through the emails, through the communications between all the decision makers and those emails will very often I'm sure not include Ms. Zhao's name. Without those communications that show what was being considered for the RIF how some people were being evaluated versus others we're not going to be able to inquire and investigate whether Ms. Zhao is being treated differently than similarly situated men and that's what this case is all about.

THE COURT: Have you agreed on what search terms recently relate to the reduction in force and the only question is whether they should be searched in the emails of these three custodians?

MS. KAISER: The question, Your Honor, is whether the search terms should be connected to her name or whether they should be searched on their own right unconnected to plaintiff's name?

THE COURT: But you agreed on those terms.

MS. KAISER: Yes, we have agreed upon those terms.

MR. GOTTLIEB: Yes, Your Honor. And if I can -- if I may Your Honor also. We haven't talked about it but we also have a disparate impact claim here and one of the elements of a disparate impact claim is that we need to show that there was a specific employment practice that's not capable of separation. So what that means is we need to show that the

RIF, the process of the RIF was a specific employment practice, not a combination of a number of different events. So we need the communications and emails regarding the RIF will demonstrate whether this was a single process or whether it's capable of separation because that's certainly one of the defenses that the defendants are going to raise. So, again, that's another reason why we need to see the communications between the decision makers regarding the RIF. I think we solve any issues of over breath by the fact that we've limited the search terms to these five or six terms that we've already agreed upon and then also limiting it to the temporal period of August -- and it's August through January 2013.

So I really think we've narrowed the search sufficiently to make it clear that we're only searching for documents that are going to be directly relevant to the plaintiff's claims.

MS. KAISER: Your Honor, we respectfully disagree with that. We've agreed to search the terms reduction, risk, head count, layoff, layoffs, layoffs and different iterations of that, terminate, fire and let go. Again, our position is that should be connected to plaintiff's name. Running the search terms across three custodians, one of whom is a business partner for Private Wealth Management which included I believe thousands of employees for even a five year period of time is likely going to produce a huge number of documents

most of which have nothing to do with Ms. Zhao. We have agreed to produce statistical information regarding the RIF. Those are the hard copy documents that we have agreed to produce. The parties are still negotiating over the parameters of what that production will encompass but we are providing that statistical information about the RIF.

So to me that seems like a much more targeted way of providing the information that plaintiff needs again rather than just running these search terms for two senior managers and an HR business partner over a period of five months unconnected to plaintiff's name.

THE COURT: Well, maybe you --

MR. GOTTLIEB: Your Honor --

THE COURT: Wait, wait. Maybe there's another way to go about this. Do you have the information as to who else was let go within plaintiff's division or people who worked for the same, reported to the same supervisors within the same geographic office and/or practice area and/or level? Do you know the names of the people who were laid off and how they fit into the business scheme?

MR. GOTTLIEB: Your Honor, the defendants -- we have big disagreements over what the pool of people is that should be considered in connection with the RIF. So that's one of the things that we're working out. So we don't have the names of the people who we think are sufficient and -- so that's

where we are on that.

But, Your Honor, the statistical data that the --

THE COURT: Well, hear me out. Hear me out.

MR. GOTTLIEB: Sorry.

THE COURT: Discovery in a discrimination case should go more broadly than discrimination solely about the individual plaintiff. Where you have allegations of conduct by a particular decision maker it is reasonable to expand the search to other conduct by that decision maker to others who might be considered similarly situated. Similarly situated might be defined in a particular company by geography. It might be defined by time frame. It might be defined by practice group. It might be defined by division. It might be defined based on a certain chain of command. The question is how is it best defined here and how is it -- what is the best way to focus a search reasonably while still going beyond the individual plaintiff.

I think the position taken by defendant that this should be focused on the individual plaintiff is too narrow a position. Plaintiff's position might be too broad but it may be that plaintiff doesn't know how to narrow it further because of the limitations of the information that's been produced to date. For example, you might say we also know there were three other people in the same division, in the same office who were also terminated, they were also women or

they were also something else, similar in some other way and if we had their names then we can run the terms regarding their reduction in force and also their name or maybe we just do searches with respect to the person known to be the decision maker and see what that yields, see how many scores or hundreds or thousands of emails that produces.

I'd like to remind you that when a party is objecting on the grounds of burden it is that party's burden to demonstrate the burden and you can't just say it's likely to result in lots of emails. If you actually run a search and you come back and you say it has yielded four million emails okay, well that tells us something. If you say the burden is going to be in reconstructing things that are on a server that's not in use any more, we're going to have to hire a forensic team to get things out of storage and whatever, it's going to cost us this much, all right you're demonstrating burden. Right now the burden sounds like it's not well substantiated and the position seems too narrow.

But, on the other hand, I don't want a situation where the burden becomes extreme and where you're going to across division lines and geographic lines to the extent where you're really looking at people who are not similarly situated and you're really looking at stuff -- it's too far afield from the claims in the case.

So I think a) a little further discussion is in

order; b) a little further homework is in order, and I'm going to tell you now that I'm going to order production beyond what defendant wants. The question is how far beyond. Defendant might want to say all right, you know what, we will provide the names and the positions and the divisions and the chains of supervisors of the other people who were let go and here are the six who we think are rational comparators who had the same decision maker and I might say okay, let's focus it that way. Or defendant might not want to do that. I might say all right, let's start with Mr. Pace and his emails and see what that yields and go back and talk about it a little further and see where you are.

It may be it doesn't yield all that much or not that much that can't be searched and bear in mind as you have some further discussions about this keep an eye on what exactly is the document request, what exactly are we looking for here. The answer is we're not looking for the emails. We're looking for emails with respect to something and the question is what is the something. Is it criteria for reduction in force? Is there a better way to do that? Is it how criteria were applied to particular people where Mr. Pace was the decision maker, how Mr. Pace applied those criteria? Is that what we're looking for. Because if you say counsel will do a search of the documents for responsive documents, responsive to what? Make sure everybody knows what the task is, what

you're looking for and what you're not looking for and -- what I'd like to do is give you a chance to talk about that a little more in light of these comments and then reconvene this call after you've had a chance to do that. See if you might be able to come up with a proposal.

Ultimately if it just turns on it's burdensome, no we don't think it is that's going to be for defendant to demonstrate maybe by an affidavit or declaration by a person with knowledge as to what it would entail, et cetera, what kind of costs would be involved based on something that's a rooted in fact estimate.

MR. GOTTLIEB: Your Honor -- go ahead, Eliza.

MS. KAISER: What I was going to say, Your Honor, is based on your comments defendant will go back and ascertain the other individuals selected for inclusion in the reduction in force by Mr. Pace and provide that information to plaintiff as a starting point for moving this process forward.

THE COURT: I think that would be helpful. I'd like to know, I'm sure plaintiff would like to know if that was one other person or 12 other people or 50 other people or 300 other people or what. I don't know how many people were let go and I don't know the extent to which Mr. Pace was involved in the decisions broadly but I think that would be telling. If it turns out he was involved in a lot of decision making that tells you something about this search effort. If he was

involved with very few people that tells you something about this search effort.

MR. GOTTLIEB: Your Honor, if I may. We have significant disagreement about who the decision makers were here and who the proper comparators are and that's something that we worked -- that we're working through and something we described in detail in the deficiency letter. So I think we're going to have a really hard time --

THE COURT: Well, let me make --

MR. GOTTLIEB: [Inaudible]

THE COURT: Let me get a snapshot of how plaintiff -- I gather you think these three people are logical decision makers and defendant is saying this was the person who decided on plaintiff. But let me get a --

MR. GOTTLIEB: These were -- sorry.

THE COURT: Let me get an idea from plaintiff's side what you think the criteria, the perfect criteria would be for comparators. What are you looking at? If you were to say this person -- the criteria was used to evaluate whether this person should be let go is appropriate to look at because this person is in a comparable situation because why. How does plaintiff look at that question?

MR. GOTTLIEB: Well, in these types of cases, Your Honor, generally it looks to where there's a common decision maker and that's really what determines a similar situation in

RIF cases. So at Deutsche Bank there's a group called Private Wealth Management or previously called Private Wealth Management and the head of that entire group, his name is Kevin Lacoate and we originally requested that he be included in the search protocol but defendant said that he was essentially too high up in the chain, that he didn't really have any input in the RIF. So I said okay, let's go one step below that. So within Private Wealth Management there are a number of smaller groups. One of them is called Global Investment Solutions. Kareem Gannem is the global head of Global Investment Solutions.

MS. KAISER: I'm sorry. That is actually not correct, David. He's the -- Benjamin Pace is the head of that group. Sorry to interrupt you but just wanted to make sure that was clear.

MR. GOTTLIEB: So Benjamin Pace is the head of Global Investment Solutions and then there's Kareem Gannem who's the head of -- I believe he's the head of Private Wealth Management.

MS. KAISER: No, I'm sorry. He's the head of Private Market.

MR. GOTTLIEB: Private Market, excuse me. Kevin Lacoate is of course the head of Private Wealth Management. Kareem Gannem is the head of Private Markets and that is where Ms. Zhao worked. So, again, rather than --

THE COURT: And what did she do? What was her job?

MR. GOTTLIEB: Her job -- well, she had a few different jobs because she was transferred during the course of her employment but --

THE COURT: What kind of level was she?

MR. GOTTLIEB: She was a vice president and when she started working there she was involved in launching investment vehicles, evaluating investment opportunities, doing due diligence on potential investment products. She was then transferred to a different group where she was involved in going on road shows and presenting investment opportunities internally to other branches and people at the bank.

THE COURT: So when there was a reduction in force did it cut across all types of levels? Did you have lower level people laid off as well?

MR. GOTTLIEB: The reduction in force as Ms. Kaiser represented at the start of the call was Worldwide but again we agreed to limit the search custodian to the people who were directly involved in the RIF at the Global Investment Solutions and Private Market level.

THE COURT: That's not the question.

MR. GOTTLIEB: Those people being --

THE COURT: That's not my question. My question is let's say you have this particular division and this particular division includes secretaries and it includes

people who work in a mail room or it includes people who would answer the phones and include people who order the food for meetings or whatever it is. Did the reduction in force involve people of those levels as well or was it more of a we're going to save more money by laying off more high level people and that's really what this is about?

MS. KAISER: My understanding, Your Honor, is that it cut across all levels from non officers up into people who had the managing director title which was the highest title at Deutsche Bank. So it was across titles, across business areas and across the world as I mentioned earlier in the call.

THE COURT: This -- the people who were the head of a particular department, did they -- is it your understanding that they delegated decision making with respect to lower level employees and reserved to themself with respect to higher level employees or did they make the call for their division at all job titles, all levels, all offices?

MS. KAISER: So my understanding is that Benjamin Pace who was the head of GIS for the United States made the decision for -- I'm sorry, it was GIS Americas. He made the decision -- all of the decisions for GIS Americas which was the sort of larger unit in which Ms. Zhao sat. So she was the smaller group. She was in the Private Markets which was in GIS which was in Private Wealth Management and Mr. Pace was the head of GIS Americas.

THE COURT: Do you have any idea of the number of people in GIS Americas or in these different subgroups, how many people we're talking about who were laid off at this time? Are we talking about within this group hundreds, thousands, twenty?

MS. KAISER: No, no. It was -- I think it would have been under 20 in GIS U.S.

THE COURT: In U.S., that's correct.

MS. KAISER: In GIS Americas, yes. I don't know if it's GIS and other countries in the America but in GIS Americas it was under 20 under Mr. Pace who were included in the reduction in force.

MR. GOTTLIEB: Again, we think it's inappropriate to look at only the United States considering that this was a worldwide RIF and GIS was not limited to the United States.

THE COURT: Well --

MS. KAISER: But --

THE COURT: But in terms of starting points -- let's put it this way. The farther afield you get the less relevant it's going to be. So if you, for example, if you get discovery that uses -- that looks for the names of the -- let's call it 20, 20 people who are laid off in this unit in the U.S. and you're not finding anything particularly helpful, they're male, they're female, they're all different races, they're all different ages, nobody else was pregnant, I mean

whatever it is, right, you're not finding anything that shows you any kind of pattern. The only thing you're finding is that there were performance issues or maybe lesser seniority or something that's completely innocent looking in terms of decision making. To think that oh, you're going to find the relevant information if you start looking at Europe or Asia or wherever else the company was it seems that the utility starts to go down.

So the closer the comparison as in I really know this person, I see this person on a regular basis, I know her work personally, I've made the decision that she should be cut because I've looked at the evaluations personally, the closer you are to that -- the hands on decision based on personal knowledge as opposed to delegating for somebody else the stronger the comparison is going to be when you're blaming the decision maker acting out of some kind of animus.

MR. GOTTLIEB: Well, Your Honor, there's two issues though. One, we have disparate treatments and there the issue is whether there's intent. We also have disparate impact. Your Honor, I think it's important to understand a couple of things. One is this was a global group. I mean the work was done on a global level. It was not limited to New York. It was not limited to the U.S. This was a global group and we're entitled to know the way the RIF was carried out by the group, not have a piecemeal production that may benefit defendant's

interpretation of the events. We're entitled to have an understanding of how the RIF occurred throughout the entire group and we've limited it, Your Honor, not to the [inaudible] group of Private Wealth Management but to Global Investment Solutions which includes two decision makers and the HR woman involved.

THE COURT: How many people altogether relate off within that line?

MS. KAISER: I actually don't know. In all of Private Wealth Management I honestly don't know how many people.

THE COURT: We had a number given to us that there were maybe 87 people laid off altogether. Is that including everything?

MS. KAISER: [Inaudible]

THE COURT: So it's going to be less than that in this line; right?

MS. KAISER: It's going to be less than that in this line. We have made the representation repeatedly to Your Honor because we have looked into this carefully that the decisions were made in this reduction force on a regional level which is why I said earlier in this call that to the extent we were to conduct the searches Benjamin Pace would be the logical person because he made the decision to include plaintiff in the reduction in force and he made the decision

for GIF U.S. I mean the decisions were not -- they were made at the regional level. So it would have been different decision makers --

THE COURT: Well, putting -- can you put in something in -- well, first of all, you said that that's your understanding. Is there something you can point to? Is there testimony to that effect? Is there documents to that effect? Is there someone willing to put in an affidavit at this stage to that effect? Because if decisions are made on a regional level then the regional level is the right place to start looking and plaintiffs can say well, I want to confirm that. Fine, give them something that confirms that but then assuming you can do that and you can confirm what you're saying then you should be more comfortable looking at the regional level.

What sounds like is evolving here is number one, go back and look for the kinds of -- the criteria type document. Number two, see if you can get something that gives plaintiff's counsel some comfort that the decision making was really done by people regionally. Number three, if you've got someone you are saying was the decision maker in this region then broaden the search beyond the plaintiff for that decision maker for that region and let's get cracking with more than just the narrow search that you wanted, and if that turns out in and of itself to be unduly burdensome then make a showing that it really is with somebody who's got knowledge of what

it's yielding and meanwhile talk with each other about what the documents are that you're looking for so that in document review you'll understand just what that task is.

MR. GOTTLIEB: Your Honor, I just -- I needed to respond on one -- a couple of points. Kareem Gannem was the head of Ms. Zhao's group and we're not going to be able to just accept a representation by counsel that the head of her group was not involved in the RIF and was not involved in her termination or the termination of other people within his group. He was the head of this group and so I mean we -- we're not going to just accept a representation that he should not be included -- the head of her group should not be included in the protocol for the RIF. That puts us in a very disadvantageous situation and --

THE COURT: Well, I can understand that. I think that there is some further homework that needs to be done in terms of what the burden would be, what -- how much it adds. Because what you're looking for is a reasonable not overly narrow approach to get the documents you're looking for.

In terms of who decision makers were in terms of termination, the decision might --

MR. GOTTLIEB: That's what --

THE COURT: Hold on, please. The decision maker might have been a person who makes the ultimate decision after consulting with particular department heads, just consulting

with particular supervisors. What do you think of this person, what do you think of that person, okay I am now making the decision, but there may have been relevant input from people who were closely associated with the plaintiff under whose supervision she worked.

So you certainly are already getting I gather documents regarding the RIF and plaintiff and you can see with respect to that whether this person would have given input for example to Mr. Pace. If that's the case maybe that person gave input regarding others as well and maybe there's a good reason for expanding it. You also may need to revisit this after some depositions and if plaintiff wants to hold back on some production it may be plaintiff pays the price of producing a person a second time for deposition if it turns out yes, the person did have involvement with making these sorts of decisions in the group and those documents should have been searched and now the person is going to have to come back again. I'm sure defendant doesn't want that.

I think that Gannem and Pace, Messrs. Gannem and Pace both sound like reasonable custodians. I think you should start looking and see what the production is starting to look like in terms of numbers, in terms of burden, in terms of what kind of effort is involved but if defendant is saying the person who really made the call for the whole region was Pace that certainly is a good point and with Gannem start with

the narrower, see what it starts to look like and maybe there's a reason to expand that as well.

So the HR person may be a better person to search for criteria or oversight type documents. Maybe you can limit the types of search terms you're looking for. Maybe not. Maybe you search all three and you start to say all right, it yielded three million here, 2.2 million here and only 1,000 documents from this other person. Look at that. Right now we're shooting in the dark.

So I think you need to do more talking. I think you need to do more homework. My point is that plaintiff may be right that some of this is appropriate. I'm reasonably persuaded that the place to start is the region. I'm reasonably persuaded the place to start where there's a person who defendant identifies as a decision maker but plaintiff, if you have some documents you can point to, if you have something other than speculation you can point to that shows that others were really involved in decision making or in setting criteria then I think defendant's counsel ought to listen --

MR. GOTTLIEB: Your Honor, there's actually no other individuals that we're asking for. We're asking for Pace, Gannem and then the HR person who was involved in the RIF and that's it. We're not -- we haven't even asked for any other custodians. We've already limited the custodians to the two

people who were the direct heads of her specific group and the Level One step up who they have said was the decision maker. So I'm not sure what else -- I mean we've already taken a compromised position here in an attempt to resolve this. I'm not sure what else we can do. There are two decision makers and the HR person and one --

THE COURT: I'm not saying that you're wrong. I'm saying go back and do some homework to see what kind of burden this really creates. I'm not going to say everything that plaintiff is asking for must be done without some further information on this. I am saying to defendant's counsel that your position is to narrow and that you should start looking into what the actual burden is and looking into what you can provide to plaintiff's counsel to give him more comfort that what you're saying is true about the region, for example.

If what defendant's counsel is saying is true then a reasonable place to start as a test to see what kind of burden we're talking about is Mr. Pace for the U.S. region for other people besides plaintiff. If that turns out not to be so burdensome then great. If that in and of itself turns out to be hugely burdensome that tells us something.

With respect to Gannem, I don't know what that person's involvement might have been. Maybe there needs to be some test runs there too to see what kind of yield you start to get. I suspect you're going to have a larger yield with

the HR person but nobody knows until you look and try and you can't make the case on burden until you do. But I'm siding more with plaintiff than with defendant. I'm just leaving some room for a defendant to come back and explain a) what the burden really is, and b) to come up with some documents or testimony or something that gives some comfort to plaintiff that some of the limitations that defendant is seeking to draw are well founded limitations. All right?

MS. KAISER: Your Honor, defendant is happy to provide an affidavit or documentation substantiating the representations that I've made on this phone call.

MR. GOTTLIEB: That's not going to be sufficient. We're entitled to take discovery on who the decision maker --

THE COURT: I'm moving on. I'm moving on. I'm telling you -- I'm telling you to go back, do some additional homework on burden and see what things start to yield. Provide some more information with respect to criteria. Provide some more information about -- to back up the decisions were made regionally. I'm not going to order a worldwide production if there's strong evidence that decision making was done regionally because then it would be speculative on your part unless you come up with something that says otherwise. But I may well say for the region search all three of these decision makers. I'm sorry, all three of these custodians. Whether they're direct decision makers or

maybe more indirect decision makers or maybe their roles are a little bit different. I may well say that. I'm just giving defendant an opportunity to look into this a little bit further and make a little further presentation on the parameters you think are reasonable, why and what the burden would be.

So plaintiff can stop being so upset that I'm limiting it. I'm not. What I'm saying is let's give a little further -- time for a little further looking into and a little further discussion. Right now I'm definitely leaning toward Pace for the region and quite possibly Gannem and the HR person as well for the region depending upon what kind of showing can be made about what this is or isn't going to yield and what kind of burden there is or isn't and not speculative.

So I'll put you back on the calendar on a short leash and you report back and I'll make some final decisions on it. I'm just not going to order it all be done now without having a better idea of burden because defendant's counsel hasn't heard me say you're going to have to make the showing. Give her a chance to do that. Okay?

I'm going to go onto the second point because I have another conference scheduled for twelve which is creeping up on me in a hurry. That is about these additional derogatory search terms that would be prohibitive of gender animus. I have no doubt that if these words are found in documents they

would be prohibitive of gender animus. The only question is what is the basis for believing that these words were used by anybody as opposed to they were used in some other case that you found where they were found to be probative because we don't just have searches for words that are pulled out of the air. If there's some basis to believe that these words were used -- I think only one of the three words at issue was used in the complaint. So I don't see any basis to exclude searches to what's actually in the complaint. But you don't have allegations about the other two words in the complaint so they seem to have come a little bit out of the air.

So let me ask that. Is it just plaintiff's lawyer saying gee, I wonder if these other words were used too or is it that the plaintiff says I've heard people use these terms in talking and I think we're going to find something in emails and we have some basis for looking?

MR. GOTTLIEB: Your Honor, they're not -- I wouldn't say they were just pulled out of thin air. These are terms that would demonstrate gender animus.

THE COURT: I agree with you on that but lots of words are --

MR. GOTTLIEB: It would be like in a race case, if somebody was terminated in a rape case --

THE COURT: In a race case you don't just say let's go into the emails and search for every racist term you can

think of. If you know that a person is prone to using certain terms and you have a basis for that you go search for the terms but you just open the dictionary and say let's search for every word we can think of, the more derogatory the better and see if anybody by any chance said one of these things. I mean it's not really the way you search --

MR. GOTTLIEB: Your Honor, we didn't do that. Your Honor, we didn't do that. We only used three words.

THE COURT: Right.

MR. GOTTLIEB: And the only -- I'm sorry, go ahead, Your Honor.

THE COURT: Let's take a specific word. Let's take -- by the way, we have an electronic recording system on the phone if anyone wants to try to make a transcript but we'll talk about specific words anyway.

Let's take the word bitch. Is there any basis based on any testimony or any document or anybody's [inaudible] evidence that anybody was prone to using the word bitch in this environment?

MR. GOTTLIEB: Well, Your Honor, we haven't taken any discovery and I don't imagine that the defendants are going to admit using the word bitch but, Your Honor, there's no prejudice here. The only prejudice is if they actually used those words. If they used those words it will come up and it's -- it will demonstrate gender animus. If they didn't use

the words then there's nothing to worry about.

THE COURT: Do you have any case law to support that -- not that the word bitch might show a gender animus but that it's appropriate to search for words that you think would show gender animus whether you have any basis for believing the word was used or not?

MR. GOTTLIEB: Your Honor, there's actually not a lot of case law on motions to compel involving search terms because I think a lot of ESI protocol disputes or resolves the way we're doing it now. I can tell you in other cases and I can produce orders in other cases where courts have allowed far -- in sexual harassment cases, for instance, where courts have allowed far reaching terms even if a specific term wasn't used because it would be demonstrative of sexual harassment and animus.

Again, we've limited it to three terms. If any of the decision makers used the term bitch clearly that would be evidence that would show animus and if they use dit obviously it's relevant and we're entitled to it, and that's really our entire position.

THE COURT: And on defendant's side --

MR. GOTTLIEB: The only --

THE COURT: Let me ask on defendant's side. If you did a search for the word bitch and [inaudible] zero, it didn't show up -- a solo search just for that word and it came

up with zero hits that's the end of it. If it came up with a dozen hits and you open that documents and it turned out people were using this word, why should those documents not be produced on plaintiff's side of this argument?

MS. KAISER: Your Honor, our position is that plaintiff has pulled these terms out of thin air. There's no allegation in the complaint that these terms were ever used, nonetheless used in connection with plaintiff. We believe that discovery has to have some sort of good faith basis and not be based on arbitrary terms that hypothetically may have been used when there's no allegation. You asked earlier if there was any documentation or any testimony substantiating the use of these terms and that certainly does not exist but there's not even an allegation in plaintiff's complaint which is quite long and detail as I'm sure you've seen that these terms were ever used in reference to plaintiff or frankly at all by the alleged discriminators at issue.

So I just -- to us this is a fishing expedition by plaintiff and we think it's highly inappropriate based on the lack of allegations concerning these terms.

THE COURT: I certainly think it's appropriate to do searches that include any of the terms that are used in the complaint, that are referred to in the complaint. At least one of the terms that were put in front of me as a dispute I think was used in the complaint.

MS. KAISER: I'm not recalling that but maybe I'm just misremembering. David, do you know?

MR. GOTTLIEB: I believe the word bitch was in the complaint. Your Honor, we've also had many cases involving Deutsche Bank and we've -- in the culture where these types of terms are used over and over again --

THE COURT: Well, wait a minute.

MS. KAISER: That doesn't --

THE COURT: Wait. Wait a minute.

MS. KAISER: I'm sorry.

THE COURT: First of all, from our look we think, although nobody is perfect, the three terms that were put before me in dispute are bitch, cunt and whore. We believe that the word cunt was in the complaint and there were some others. If that's right search for it. That leaves us I think, and if it's wrong then you'll follow the logic -- by the way, I see my other line flashing at me which suggests that my other call is on. Hold on a second. Let me see if I can ask them to call back in a short while which of course will make the next one fall like a domino but hold on a second.

[Pause in proceedings.]

THE COURT: All right.

MS. KAISER: Your Honor --

THE COURT: Wait a minute. Wait a minute. With

respect to words that are not in the complaint, if the assertion is that there has been another case involving the same employer in the same environment where -- in the same office where there -- words are permeating a culture, where the word bitch was used, okay well, it may be a basis. If what you're saying is there have been a lot of cases where words "like this" were used, you're not only taking it a step removed from this case to another case but you're talking about words like something and I don't know what words are like what other words because I don't know what words were involved in some other case.

So if you've got something concrete that you can point to, even if it's another litigation, if there's a sufficient connection and you've got evidence from somewhere else or even an allegation from somewhere else that the word bitch was used in this working environment okay. But if you're just saying well, these are words that are sort of like these words in my view, the lawyer came up with other words that the lawyer thinks are similar, these are -- it opens it up to -- how do you pick and choose, which words do you decide to fish for. If she heard somebody say something I think it should be searched for. If she never heard anybody say something, nobody else ever heard anybody say something, nobody else in another case that you point to ever heard the person say something, I'm not sure you've got a basis for

making somebody else in discovery do search terms -- do searches for words that you've got no -- there's no grounding for.

The dictionary is a big thing and you happen to pick some. You could have picked some others. Why? Because a lawyer thought they might be similar? I think you search for what you have evidence of to try to expand on that and then if you discover in some other document look, there are some other words, that might open the door to further searches for that and one thing leads to another. But just a hunch that maybe something is there I don't know. It's problematic because of the kind of -- the kind of logic and the kind of precedent where you say I think we ought to go look for this too because on my hunch that might be there too. I recognize these words are all of -- I wouldn't say similar meaning but you can see relatedness.

So I'm a little bit more on the fence than my comments just now might betray because like I said if defendant were to search -- and maybe the answer is you do the isolated just see if you get any hits at all with the word without any other words with it and just see and if it turns out there are in fact documents and maybe plaintiff's hunch was well -- was a good one based on circumstance and if there's a nothing, no harm, no foul, there's nothing to produce, but I'm troubled by the concept. I'm troubled by the

concept of nobody testified, nobody made an allegation and there's no existing document, there's no informal word of mouth from statements from witnesses. There's no anything that these words were used in the workplace and yet defendant should go look for them because where could that lead as a general principle in discovery.

MR. GOTTLIEB: Again, Your Honor, we limit -- we tried to limit it here. There's no harm by the defendant conducting a search and if the terms were used they're used. If they're not, they're not used. The only way we'll ever know if they were used because no one is ever going to admit to it is if we do the search -- if we use the search terms.

THE COURT: I don't know. I think in the end I think this is going to be -- the cost is going to be on defendant to go back and do a second search. If the defendant does a search that is broad enough to talk about plaintiff's termination and the termination of others in connection with the reduction in force and it turns out that there are others who are women and derogatory terms are used in the emails by the same supervisory crew and there's another word in one of those documents it's going to open up to searches for other words that are in those documents to explore more broadly and see what's found.

But I am a bit reluctant to just start off with searches that are broader than anything that anybody is

willing to say they ever heard in the workplace when you're talking about derogatory language like this. I'm concerned about where that leads us in the next case and the next case or in the next round of discovery. So right now I would say limit it to what is in the complaint and if on defendant's side if you want to put it to be bed to fend off any kind of meaningful appeal and you just do it for your own interest sake anyway and it turns up with a zero you can say I did it anyway, it turned up with a zero, now go away. If it turns up with something then defendant in good faith better be looking at those documents but in terms of ordering it, I am -- I'm really hesitant to order production of words that came out of the lawyer's head and don't have the specific grounding in terms of ever being overheard in the workplace. I'm just worried about where that takes us in terms of the next logical step.

MR. GOTTLIEB: Again, Your Honor, I think we -- okay.

THE COURT: If I'm right with respect to what's in the complaint you get one out of three anyway. Defendant take back what I said and think about it. Unless --

MS. KAISER: We will do so, Your Honor.

THE COURT: Yes. Unless you can show me some authority that's even analogous somehow that other words that the lawyer thinks might be related -- look, obvoiusly with reduction in force you might say layoff is related but that's

a little different in character than what --

MR. GOTTLIEB: I can, Your Honor, so you -- I can [inaudible] protocols ordered by other judges that --

THE COURT: Will I know what it was based on? Will I know if the lawyer said my client heard people use these words?

MR. GOTTLIEB: I can certainly -- yes, the complaint -- the ESI protocol was established in other cases that we've done before depositions but after there's only been a complaint.

THE COURT: Right. But the question is did you say to the judge my client never heard anybody say this but we, the lawyers, think it's a related enough term that we should get it or did you say to the other judge my client heard this word and the judge said fine, the client is saying she heard this word?

MR. GOTTLIEB: It was the former, Your Honor, and I'm speaking of a sexual harassment case that I litigated before Judge Wexler in the Eastern District where this same issue came up and it was the former. It was words that were reasonably related to other terms that had been used and to the theory of the complaint. Again, here I thought we tried to keep the terms very limited only to the actual decision makers and only to terms that typically are used and demonstrate gender animus. Again, I think there's no harm in

them running the search terms. There's no -- there's literally very, very little cost to them at all and then we know if the decision makers were used terms to demonstrate gender animus.

THE COURT: You know what? Let me put you back on the calendar for a short time out. Go back and do a little more thinking. Do a little more talking. On defendant's side do a little more consulting. Come back on this point too. Right now I'm not ordering anything beyond what the terms are that are in the complaint or if plaintiff wants to give some kind of statement beyond that but I assume what she's got is in the complaint. But I'll give it some more thought. Defendants should give it some more thought and I'll take a look at anything you have to show me from another case. It's sort of my concern precedent follows precedent. That's exactly what people do. They take this one, they go to the next judge, they take the next one, go to the next judge. This one just -- I find it a little bit troubling but I'll give it some further thought.

Let me get you on pretty soon again to follow up on this and just to pin things down. I'm sorry for being vague but I want to give counsel, especially on defendant's side, a little time to mull over these thoughts and maybe reformulate some positions.

Today is October 31st. Maybe one day next week. I

don't know how long it will take on defendant's side to run some searches and get some information about what it's really -- what kind of volume is really coming up or if there are any other burden issues you want to bring to my attention that are specific.

MS. KAISER: Your Honor, I think we're going to need more time than because we are still -- we expect to receive the data from our client any day but it still has to be processed which we're dealing internally at Kramer Levin. So I just don't exactly know when that will be complete and after it's processed we can start to run searches and [inaudible] searches and that kind of thing but we expect to receive the data this week. So I'm hoping by tomorrow but I --

THE COURT: What data are you talking about?

MS. KAISER: The emails. We don't actually have the emails. They're being collected by our client for the nine custodians but because there was nine custodians there's a ton of data.

THE COURT: I'm sorry. You're collecting all of their emails or you're collecting certain emails?

MS. KAISER: They're collecting all of their emails for the agreed upon time frames and then we internally at Kramer Levin are running the agreed upon search terms. So it's as you can imagine a lot of data for nine custodians.

THE COURT: Well, can you -- is it possible for you

to prioritize? So, for example, Mr. Pace seems particularly important. Mr. Gannem who it seems maybe next is important. Is it possible for you to, or at least with respect to this dispute, others may be important on other issues. Is it possible for you to put something before something else so that you can --

MS. KAISER: I think it's actually all almost done as I said. I think we're supposed to receive everything. So it's not --

THE COURT: When are you supposed to receive this?

MS. KAISER: We're supposed to receive it sometime this week. So I just need a follow up about an exact time frame we're going to receive it and how long it will take to process depends on the volume of the data.

THE COURT: Why don't I put you back on for a week from now and we'll see where things are.

MS. KAISER: Okay. I just --

THE COURT: The week after I'm very, very tied up and I don't want to let it go longer than that.

MS. KAISER: Okay. Right. I'm just quite confident, Your Honor, that the processing takes a few days and then running search terms takes additional time. So I don't know if within a week from today we're really going to have -- a highly doubt that those steps are going to be able to have been taken by that point in time.

THE COURT: You can have some further conversations too about what I said and you can see if you find any documents in the HR level and so on.

MS. KAISER: We will expedite from --

THE COURT: Talk to the tech people.

MS. KAISER: We'll expedite from our end certainly Mr. Pace's emails but just the processing and uploading for nine custodians is quite a big task.

THE COURT: Well, my problem is the week of the 11th I'm really only here for two days and they're very, very booked and then the week of the 18th is kind of far out to get some resolution on these issues. If need be we'll kick the can again but I'd rather not. I'm going to mull over what's been said to me on the argument. I'm going to ask counsel to mull over and talk to each other. Maybe the disputes can at least be narrowed by a week from now or maybe I'll just say all right, you need some more certainty, you haven't done this yet but I'm going to make some more definitive rules. I could have done that today. I just -- I want to give you a little bit more of a chance to provide me with a little bit more information.

I'm sorry it's taken this long to get to having this call too. I was on trial and things were a little bit crazy. But anyway, let me put you down on Friday afternoon at 3:00 if that's okay. The 8th. The end of next week.

MS. KAISER: That's fine, Your Honor.

THE COURT: Can you both do that?

MR. GOTTLIEB: That's good, Your Honor.

THE COURT: I'll put you down there. We'll try to get to the end of these issues and by the way, something else that comes under -- it was in my daily with respect to general pretrial supervision is seeing if I can help you with settlement. I didn't ask it at all but let me just throw it out there. Have you had any conversations?

MR. GOTTLIEB: We did the court order, the SDNY mediation. We didn't get very far there. I'm not sure if it would be productive at this point. Eliza, what are your thoughts?

MS. KAISER: Based on the mediation I would say unless plaintiff's position has changed considerably probably not. We are quite far apart, Your Honor. We're not obviously opposed to the concept of it but we were quite -- we are quite far apart at the court ordered mediation.

THE COURT: Well, next time we won't spend as long on discovery and maybe we'll put on the agenda to talk a little bit about settlement and the settlement positions of the parties and why you have those positions because as the case progresses as you learn things and work with each other positions can change. Sometimes right out of the box is great because you save litigation expenses and sometimes you need to

have things percolate a little bit more. But it is something that I'm going to want to follow up with you on.

So while you're talking internally see if there's any potential movement from either side on settlement and be prepared to talk to me about that when we reconvene. Okay?

MR. GOTTLIEB: Very good. Thank you, Your Honor.

MS. KAISER: Thank you, Your Honor.

THE COURT: Thanks for your patience. Bye-bye.

* * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Shari Riemer

Dated: May 13, 2014